Chin Hin Helmet Sdn Bhd v SSN Medical Products Sdn Bhd

HIGH COURT (SHAH ALAM) — CIVIL SUIT NO 22NCVC-365–07 OF 2014
ABD MAJID JC
7 JANUARY 2019

Evidence — Expert evidence — Consideration of experts' reports and testimonies — Assessment of damages — Whether valuation report by expert could be challenged by another expert — Whether defendant's expert could be called to give opinion on methods used by plaintiff's expert — Whether defendant's expert should prepare report

Land Law — Vacant possession — Assessment of damages — High Court entered judgment for plaintiff for wrongful occupation — Judgment executed vide writ of possession — Plaintiff applied for assessment of damages — Whether assessment should be made on the whole premises or part of the premises — Whether defendant wrongfully occupied premises

This was an application by the plaintiff for assessment of damages. The High Court on 5 December 2014 had entered judgment for the plaintiff for wrongful occupation. Having failed to obtain vacant possession, the plaintiff sought for leave to execute the judgment by writ of possession. The writ was issued on 26 January 2016 and executed on 3 Mac 2016. The defendant then sought for an extension of time until 17 April 2016 to remove the machineries and paid the plaintiff RM70,000 for that purpose and the removal was completed by 16 April 2016. The subject matter for assessment was a premise addressed at No 1, Jalan Tandang 203, Off Jalan Tandang, Section 51, 46050 Petaling Jaya, Selangor Darul Ehsan. There were two structures which constituted the whole premises which were a five storey office building and a single storey warehouse and both were attached to each other. It was the case for the plaintiff that the assessment was for the whole premises as opposed to the defendant that the assessment should be confined to the single storey warehouse. In the present case, the defendant called DW1 as a registered valuer but DW1 did not prepare any report himself instead he was called to comment on the methods used by PW4. It was not disputed that the five storey building was not issued with a certificate of fitness ('the CF'). As for the single storey house, the CF was issued in 1960 and one 'Sijil Perakuan Selesai Tambah Binaan' in 1974 for a store and cold room. The plaintiff's company director ('PW3') told the court that the premises was bought by the plaintiff through a public auction on 13 February 2014 and at that time, the defendant was already in occupation at premise under a tenancy agreement with a company

known as Damai Adil Sdn Bhd, the previous owner of the premises. He stated that the plaintiff had obtained a judgment against the defendant on 5 December 2014 for vacant possession. He alleged that the defendant had wrongfully occupied the premises from 27 June 2014–17 March 2016. The issues arose were: (a) whether the office building or other part of the warehouse should be excluded as no CF was issued; and (b) whether DW1 could be called to give his opinion on methods used by PW4 as he did not prepare any report of his own.

Held, allowing the plaintiff's claim with costs:

(1) The order for sale obtained by Affin Bank, the action against the defendant for vacant possession and the tenancy agreement with Damai Adil Sdn Bhd were for the whole premises. Therefore, the defendant could not argue that the defendant did not rent the whole premises (see para 11).

(2) By referring to the decisions made in *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708 and the case of *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255, the court was of the view that the user principle was applicable to the present case (see paras 13–14).

(3) With regard to expert, the purpose of calling for a valuation report was to determine the market or rental value of the said property. The position was that generally there was no necessity for the defendant to counter PW4's expert evidence by calling their own expert if it could be shown that PW4's was obviously indefensible and was not supported by the basic facts of the case. The court was of the view that if the defendant wanted the court to consider their expert then for the purposes of the present case which involved the issue of valuation, then a report was necessary. Without a report, the court should not consider whatever opinion by DW1 on PW4's report. The court was satisfied with PW4's evidence as PW4 considered the recognised methods of valuation and came up with separate valuation for the warehouse and the office building as provided in Malaysian Valuation Standards (see paras 15–19).

[Bahasa Malaysia summary

Ini adalah permohonan oleh plaintif untuk taksiran ganti rugi. Mahkamah Tinggi pada 5 Disember 2014 telah memasukkan penghakiman bagi plaintif bagi penghunian salah. Setelah gagal memperoleh pemilikan kosong, plaintif memohon kebenaran untuk melaksanakan penghakiman tersebut dengan writ milikan. Writ tersebut dikeluarkan pada 26 Januari 2016 dan dilaksanakan pada 3 Mac 2016. Defendan kemudian memohon lanjutan masa sehingga 17 April 2016 untuk membuang jentera dan membayar plaintif RM70,000 untuk tujuan tersebut dan pemindahan tersebut telah diselesaikan pada

16 April 2016. Perkara utama untuk taksiran adalah premis yang beralamat di No 1, Jalan Tandang 203, Off Jalan Tandang, Seksyen 51, 46050 Petaling Jaya, Selangor Darul Ehsan. Terdapat dua struktur yang membentuk keseluruhan premis yang merupakan bangunan pejabat lima tingkat dan satu gudang satu tingkat dan kedua-duanya bersambung di antara satu sama lain. Adalah menjadi kes bagi plaintif bahawa taksiran tersebut adalah untuk keseluruhan premis bertentangan dengan defendan bahawa taksiran itu harus terhad kepada gudang satu tingkat tersebut. Dalam kes ini, defendan memanggil DW1 sebagai penilai berdaftar tetapi DW1 tidak menyediakan apa-apa laporan sendiri sebaliknya dia dipanggil untuk memberi komen mengenai kaedah yang digunakan oleh PW4. Adalah tidak dipertikaikan bahawa bangunan lima tingkat itu tidak dikeluarkan dengan perakuan kelayakan ('CF'). Bagi rumah satu tingkat tersebut, CF dikeluarkan pada 1960 dan satu 'Sijil Perakuan Selesai Tambah Binaan' pada 1974 untuk stor dan bilik sejuk. Pengarah syarikat plaintif ('PW3') memberitahu mahkamah bahawa premis tersebut telah dibeli oleh plaintif melalui lelongan awam pada 13 Februari 2014 dan pada masa itu, defendan telah pun berada di premis di bawah perjanjian penyewaan dengan syarikat yang dikenali sebagai Damai Adil Sdn Bhd, pemilik premis sebelumnya. Dia menyatakan bahawa plaintif telah mendapat penghakiman terhadap defendan pada 5 Disember 2014 untuk pemilikan kosong. Dia mendakwa bahawa defendan telah menduduki premis secara salah dari 27 Jun 2014–17 Mac 2016. Isu-isu yang timbul ialah: (a) sama ada bangunan pejabat atau bahagian lain gudang tersebut dikecualikan kerana tiada CF dikeluarkan; dan (b) sama ada DW1 boleh dipanggil untuk memberikan pendapatnya mengenai kaedah yang digunakan oleh PW4 kerana dia tidak menyediakan apa-apa laporan sendiri.

Diputuskan, membenarkan tuntutan plaintif dengan kos:

(1) Perintah penjualan yang diperoleh oleh Affin Bank, tindakan terhadap defendan untuk pemilikan kosong dan perjanjian penyewaan dengan Damai Adil Sdn Bhd adalah untuk keseluruhan premis. Oleh itu, defendan tidak dapat membantah bahawa defendan tidak menyewa seluruh premis (lihat perenggan 11).

(2) Dengan merujuk kepada keputusan yang dibuat dalam *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708 dan kes *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255, mahkamah berpendapat bahawa prinsip pengguna terpakai bagi kes ini (lihat perenggan 13–14).

(3) Berhubung dengan pakar, tujuan menuntut laporan penilaian adalah menentukan nilai pasaran atau sewa harta tersebut. Kedudukannya adalah secara amnya tiada keperluan bagi defendan untuk membalas keterangan pakar PW4 dengan memanggil pakar mereka sendiri jika

dapat ditunjukkan bahawa PW4 itu jelas tidak dapat dipertahankan dan tidak disokong oleh fakta asas kes itu. Mahkamah berpendapat bahawa sekiranya defendan mahukan mahkamah mempertimbangkan pakar mereka maka bagi tujuan kes ini yang melibatkan isu taksiran, maka laporan tersebut adalah perlu. Tanpa laporan, mahkamah tidak boleh mempertimbangkan sebarang pendapat oleh DW1 mengenai laporan PW4. Mahkamah berpuas hati dengan keterangan PW4 kerana PW4 mempertimbangkan kaedah penilaian yang diiktiraf dan dibuat dengan penilaian berasingan bagi gudang dan bangunan pejabat seperti yang disediakan dalam Standard Penilaian Malaysia (lihat perenggan 15–19).]

Notes

For a case on consideration of experts' reports and testimonies, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) para 1949.

For cases on vacant possession in general, see 8(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5969–5975.

Cases referred to

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255, CA (refd)

Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 MLJ 356; [1990] 1 CLJ Rep 57, SC (refd)

Dato' Mokhtar bin Hashim & Anor v Public Prosecutor [1983] 2 MLJ 232, FC (refd)

Majuikan Sdn Bhd v Barclays Bank Plc [2015] 1 MLJ 171; [2017] 6 MLRA 696, CA (refd)

Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah [2015] 5 MLJ 619; [2015] 8 CLJ 212, FC (refd)

Network Foods (M) Sdn Bhd v Syabinas Holdings Sdn Bhd & Anor [1997] MLJU 206; [1997] 4 CLJ 49, HC (refd)

Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708, CA (refd)

Senga Engineering & Construction Sdn Bhd v Richwin Holdings (M) Sdn Bhd [2016] MLJU 1902; [2016] 7 CLJ 463, HC (refd)

Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21, FC (refd)

Legislation referred to

Valuer's Appraisers and Estate Agent Rules 1986 r 76(2)

HL Teh (HL Teh) for the plaintiff.
Chong Ian Shin (Arulampalam & Co) for the defendant.

Abd Majid JC:

ASSESSMENT OF DAMAGES

[1] This is an application by the plaintiff for assessment of damages. The High Court on 5 December 2014 entered judgment for the plaintiff for wrongful occupation. There was a stay order obtained by the defendant and expired on 2 December 2015 and a further stay was granted which was withdrawn on 9 December 2015. Having failed to obtain vacant possession the plaintiff sought for leave to execute the judgment by way of writ of possession. The writ was issued on 26 January 2016 and executed on 3 March 2016. Vacant possession was eventually delivered to the plaintiff on 17 March 2016. The defendant then sought for extension of time until 17 April 2016 to remove the machineries and paid the plaintiff RM70,000 for this purpose and the removal was completed by 16 April 2016.

[2] The subject matter for assessment is a premises which address is No 1, Jalan Tandang 203, Off Jalan Tandang, Section 51, 46050 Petaling Jaya, Selangor Darul Ehsan. There are two structures which constituted the whole premises ie a five storey office building and a single storey warehouse and both are attached to each other. It was the case for the plaintiff that the assessment was for the whole premises as opposed to the defendant that the assessment should be confined to the single storey warehouse.

[3] It was not disputed that the five storey office building has not been issued with a certificate of fitness ('CF'). As for the single storey warehouse, a CF was issued in 1960 and one 'Sijil Perakuan Selesai Tambah Binaan' in 1974 for a store and cold room.

THE PLAINTIFF'S CASE

[4] The CF issued to Malayan Terrazzo Ltd dated 11 June 1960 (A2 p 11) tendered through PW1 the Pengarah Kawalan Bangunan with Majlis Bandaran Petaling Jaya ('MBPJ') refers to the said premises obviously making no distinction between the single storey warehouse and the five storey building. According to PW2 the Penolong Pegawai Senibina MBPJ the CF was only issued in respect of the warehouse. The five storey building is additional where the approved plan was issued only for four storey and was abandoned in 1985. He stated further that MBPJ has no knowledge of when the five storey building was completed and that that building has no CF. He confirmed that there was one 'Sijil Perakuan Selesai Tambah Binaan' issued on 28 September 1974 for the additional structures in the warehouse which according to PW2 was equivalent to a CF.

[5] PW3 the plaintiff's company director told the court that the premises was bought by the plaintiff through a public auction on 13 February 2014 and at that time the defendant was already in occupation of the premises under a tenancy agreement with a company known as Damai Adil Sdn Bhd the previous owner of the premises. He stated that the plaintiff had obtained a judgment against the defendant on 5 December 2014 for vacant possession. He alleged that the defendant has wrongfully occupied the premises from 27 June 2014–17 March 2016.

[6] PW4 a registered valuer prepared a valuation report (A1 pp 122–179) and a supplementary report (A2 pp 1–4). He came up with the supplementary report for the purposes of determining the market rental value from 27 June 2014–17 March 2016. In this supplementary report a different valuation was put up for with CF and without CF namely, RM2,848,648.80 without CF (both the warehouse and the office building) and RM2,783,625.30 without CF ('the warehouse'). The gross monthly rental was RM131,770.83 RM128,763.02 respectively. He used the Capitalisation of Market Income Approach of Valuation and the Comparison Method and the Cost Approach in his valuation.

THE DEFENDANT'S CASE

[7] DW1 a registered valuer was called to comment on the methods employed by PW4. According to him, the evidence of PW4 and his report was flawed, inter alia, in that:

(a) it was based on assumption;

(b) no reference to the building plan;

(c) it was not based on the net lettable area;

(d) the illegal structures were included;

(e) no suitable comparables; and

(f) interest was included.

[8] When the learned counsel proposed to call DW1 it was objected to by the learned counsel for the plaintiff and I also raised the issue whether DW1 can be called to give his opinion on methods used by PW4 as he did not prepare any report of his own. However, subsequently the learned counsel for the plaintiff withdrew his objection and informed the court that he will submit on it at the end of the case. I will say more on this later.

[9] DW2 the managing director of the defendant told the court that the defendant rented the premises from the earlier owner Damai Adil Sdn Bhd. And they only rented and occupied half of the warehouse and there were other tenants as well.

DECISION

[10] Having heard the submissions I allowed the plaintiff's claim for the whole premises. My grounds are as follows.

[11] The order for sale obtained by Affin Bank, the action against the defendant for vacant possession and more importantly the tenancy agreement with Damai Adil Sdn Bhd (B1 p 20) were for the whole premises. I do not think the defendant can now say he did not rent the whole premises.

[12] The next issue is whether the office building and some parts of the warehouse should be excluded as no CF was issued. The authorities referred to by the learned counsel for the defendant were cases under the law of contract the subject matter of which was tenancy agreement (*Network Foods (M) Sdn Bhd v Syabinas Holdings Sdn Bhd & Anor* [1997] MLJU 206; [1997] 4 CLJ 49, *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21; illegality (*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 MLJ 356; [1990] 1 CLJ Rep 57), *Senga Engineering & Construction Sdn Bhd v Richwin Holdings (M) Sdn Bhd* [2016] MLJU 1902; [2016] 7 CLJ 463, *Merong Mahawangsa Sdn Bhd & Anor v Dato' Shazryl Eskay bin Abdullah* [2015] 5 MLJ 619; [2015] 8 CLJ 212 and a few others which to my mind are not applicable. The learned counsel for the plaintiff contended that in cases of this nature the court should adopt the 'user principle' as the plaintiff's case against the defendant in the earlier action was for vacant possession and that the tenancy agreement between the defendant and the earlier owner was not binding upon the plaintiff.

[13] In *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708 at p 718 Varghese George JCA said as follows:

> [31] It was undeniable that *in a normal case* where once a trespass to land or a deprivation of use of land had been established, the normal measure of damages to be applied would be the actual proof of 'loss of *rental*' or a reasonable estimation of such a 'rental return' that was directly attributable and flowing from a lawful use of the land but denied by that wrongful action. This was consistent with the two underlying basic principles in law which required that any damages awarded would, so far as money can, put the affected or deprived party in the same position as he would have been if the tort had not occurred subject to the further overriding consideration that such damages to be awarded was in any event not too remote or speculative in nature.

> [32] In *Inverugie Investments v Hackett* [1995] 3 All ER 841, the Privy Council opined (in an appeal from the Bahamas Court of Appeal) that although the plaintiff might not have suffered any actual loss by being deprived of the use of property, he was still entitled to recover a reasonable rent for the wrongful use of his property by the trespasser, and similarly, even if the trespasser might not have derived any actual benefit from the use of the property, he was still obliged to pay a reasonable 'rent' for the benefit or use he enjoyed based on what has been termed as the 'user principle'.

This case was referred to in *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255 the appellant was sued for trespassing for constructing a temple and several other building which encroached onto the respondent's land. At pp 262–264 Mary Lim JCA had this to say:

> [18] What may be concluded from the Court of Appeal's decision in *Othman bin Ali* is that while damages for trespass is awarded for loss, actual proof of loss is still required. Generally, that would be in the form of rental as the unlawful occupation has adversely affected the intention or ability to let or lease out the land in question. If that were not available, then, damages would be based on 'a reasonable estimation of such a 'rental return'. In either case, the loss must also be directly attributable and flowing from the loss of a lawful use of the land but for the unlawful occupation or trespass. This means the damages to be awarded must not be too remote or speculative.
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> [21] Since trespass is actionable per se, once trespass has been proved, whether the claimant can show he could have let out the property to another person, or whether he would have used the property himself, is in fact, immaterial. The claimant is entitled to damages for the trespass without bringing evidence of such intentions. In the absence of anything special, it would be the 'ordinary letting value of the property that would determine the amount of damages' as held by Megaw LJ in *Swordheath Properties Ltd v Tabet and others* [1979] 1 All ER 240.
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> ...
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> [26] For the purposes of this appeal, suffice for us to say that the user principle applies, that the appellant must pay damages for its improper use of the respondent's land, or for the use which the appellant has enjoyed. In our judgment, that would be the cost of use of the land.

[14] Based on these authorities, I am of the view that the user principle is applicable to the present case.

[15] In assessing the damages PW4 was called by the plaintiff and DW1 by the defendant. With regard to expert, the purpose of calling for a valuation report is to determine the market or rental value of the said property. In arriving at his finding the valuer would refer to various recognised methods of valuation. In the present case the defendant called DW1 who himself a registered valuer, however, DW1 did not prepare any report himself instead he

was called to comment on the methods used by PW4. In *Majuikan Sdn Bhd v Barclays Bank Plc* [2015] 1 MLJ 171; [2017] 6 MLRA 696 Abang Iskandar JCA (as he then was) speaking for the Court of Appeal at p 186 (MLJ); p 709 (MLRA) had this to say:

> [34] The counsel for Majuikan has, on the other hand, stressed that we should also consider the other general principle on handwriting expert evidence in relation to unopposed expert evidence. The counsel cites *PB Malaysia Sdn Bhd v Samudra (M) Sdn Bhd* [2009] 7 MLJ 681; [2008] 6 MLRH 841, where Ramly J (as His Lordship then was) held: '... the court may not reject unopposed expert evidence unless the evidence is 'obviously lacking in defensibility'. This High Court's decision in fact cited and applied the principles laid down in two Singapore Court of Appeal's decisions, namely *Saeng-Un Udom v Public Prosecutor* [2001] 3 SLR 1, and *Dr Lo Sook Ling Adela v Au Mei Yin Christina & Anor* [2002] 1 SLR 408. In the latter case, Chao Hick Tin JA held:
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> > In law, while a judge is not obliged to accept the opinion of an expert, even in a situation where there is no contrary expert evidence, such rejection must be based on sound grounds ...
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> [35] We are in agreement with these principles and in our view, a judge who is not an expert himself, should defer to expert opinion unless that evidence is obviously indefensible and is not supported by the basic facts of the case. Where there are conflicting expert opinions, the judge is of course entitled to bring to bear his own judicial appreciation of the matter, and choose one over the other, but where there is only one expert opinion, he should not as a rule reject that opinion outright without judiciously considering whether it is obviously indefensible and unsupported by the basic facts of the case. Such a principle is in accord with the principle that the court is the final arbiter, as stated in *Dr Shanmuganathan v Periasamy s/o Sithambaram Pillai* [1997] 3 MLJ 61; [1997] 1 MLRA 1:
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> > ... the principal object of expert evidence is to assist the court to form its own opinion. An expert should give his reasons. The court is the final arbiter, not the experts or witnesses ... The learned judge should have considered the reasoning given by the expert and with that assistance arrive at the conclusion. In failing to do so the learned judge had abdicated his function. The learned judge is entitled to reject the evidence but not before considering such evidence ...

[16] The position is that generally there is no necessity for the defendant to counter PW4's expert evidence by calling their own expert if it can be shown that PW4's evidence 'is obviously indefensible and is not supported by the basic facts of the case'. In the present case apart from testifying on the methods of valuation, PW4 came up with figures. In other words, he gave his opinion on the market and rental value of the premises in question.

[17] DW1 while offering his opinion on the methods used, he himself was not asked by the defendant to prepare a report hence, he did not do any analysis on the market or the rental value of the premises. Therefore, no figures were

offered by him. To my mind, if the defendant wanted the court to consider their expert then for the purposes of this case which involves issue of valuation then a report is necessary. And this would be in accordance with sub-r 76(2) of the Valuer's Appraisers and Estate Agent Rules 1986 ('the Rules') which reads:

> 76 Conduct in proceedings before judicial bodies
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> (1) ...
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> (2) In preparation for his appearance in court he should make a careful and detailed examination of the property concerned after taking into consideration all relevant factors which might tend to influence the value.
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> (3) ...

[18] On the authority of *Dato' Mokhtar bin Hashim & Anor v Public Prosecutor* [1983] 2 MLJ 232 the chemist called by the defence George Fassnacht was called to comment on the analysis given by the government chemist and he did not produce any report. The learned trial judge allowed him to testify and eventually did not find him an expert on firearm identifications. DW1 on the contrary is no doubt a registered valuer however the Rules necessitates a report to be provided. Without a report, I do not think I should consider whatever opinion he had on PW4's report. In the event that I am wrong, I would still not be able to consider his opinion as he did not enter the premises hence, there was no detailed examination of the premises as required by sub-r 76(2).

[19] As far as PW4's evidence was concerned I am satisfied that he had considered the recognised methods of valuation and came up with separate valuation for the warehouse and the office building in his second report. The methods were provided in the Malaysian Valuation Standards. I accepted his expert opinion and the valuation provided.

[20] Based on the above discussion the plaintiff's claim is therefore allowed with costs.

Plaintiff's claim allowed with costs.

Reported by Mohd Kamarul Anwar